IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.RAMKUMAR

THURSDAY, THE 6TH SEPTEMBER 2007 / 15TH BHADRA 1929

RPFC.No. 187 of 2006()

MC.422/2003 of FAMILY COURT, MALAPPURAM
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REVN.PETITIONERS/PETITIONERS
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1. SEENATH, AGED 26, D/O. MUHAMMED,
MADATHILKUNNAN HOUSE,
MUNDAPPOTTI, MARUTHA P.O., NILAMBUR,
MALAPPURAM DISTRICT.

2. FASIL, AGED 3, S/O. SEENATH
(MINOR - REP. BY HIS MOTHER SEENATH.)

BY ADV. SRI.K.S.MADHUSOODANAN
SRI.T.V.JAYAKUMAR NAMBOODIRI

RESPONDENTS: COMPLAINANT & FORMAL PARTY
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1. KUNHI THANGAL, AGED 50,
S/O. KUNHIPPU THANGAL, PANAYATHIL HOUSE,
MAKHAMPADI, PATTIKKAD, PERINTHALMANNA.

2. STATE OF KERALA, REP. BY
PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY ADV. SRI.K.M.SATHYANATHA MENON
PUBLIC PROSECUTOR SRI.K.S. SIVAKUMAR

THIS REV.PETITION(FAMILY COURT) HAVING BEEN FINALLY HEARD ON 17/08/2007, THE COURT ON 06/09/2007 PASSED THE FOLLOWING:

V. RAMKUMAR, J.

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R.P.(FC) No. 187 of 2006

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Dated, this the 6th day of September 2007

O R D E R

In this Revision filed under Sec. 19 (4) of the Family Court Act, 1984 the revision petitioners who are a woman and her minor son challenge the revised order dated 21-7-2006 passed by the Family Court, Malappuram in M.C. 422 of 2003.

2. The case of the petitioners can be summarised as follows:-

The first petitioner Seenath was married by one Koyamon on 16-7-2001. After 8 months of her marriage her husband left the house stating that he is going to Kozhikode. He did not thereafter return to the first petitioner. After her husband had deserted her the first petitioner was finding it difficult to sustain herself. Sometime in the year 2002, she was taken to her mother's house at Pattikkad for treatment. For the mental distress of the first petitioner, consequent on her husband leaving her, she was taken to the respondent Kunhithangal. Her mother also accompanied her. On the first day, the respondent chanted certain prayers in Arabic and asked her to visit him every week without the company of her mother. On the second time, when the first petitioner went to see the respondent he made her lie on a sofa and pressed on different parts of her body. When the first petitioner resisted the respondent told her that she was under the influence of an evil spirit and that only if the devil in her was released could she get back her husband.

He then chanted some prayers in Arabic. On 4-10-2002 when the first petitioner again went to the respondent for treatment, he gave her a glass of water and chanted some prayers. She drank the water and soon became semi-conscious during which stage the respondent had sexual intercourse with her. She was not in a position to raise her voice or resist. The respondent then threatened her with dire consequences if she revealed the incident to anyone. She therefore, did not reveal the incident to anyone out of fear. In that relationship she conceived. At a time when she was seven months pregnant her people found out that she was carrying. When questioned, she revealed the entire incident to them. The father, mother and others met the respondent and talked to him. He confessed his mistake and told them that he will accept the responsibility of the child. Accordingly, he sent them back asking them to come again after the child birth. The first petitioner gave birth to the 2nd petitioner Fazil on 23-6-2003 at Nirmala Hospital, Edakkara. When the first petitioner's father met the respondents he took up the stand that he was not the father of the child and asked him not to meet him again. The first petitioner has no independent means of her own. She is not able to bring up the child without the help of the respondent. The respondent is working as a teacher earning a monthly salary of Rs. 5,000/-. He has also two houses besides two acres of landed properties from which he is getting a monthly income of Rs. 3,000/-. He has also other income by doing black magic. The respondent may be directed to pay a monthly maintenance of Rs. 1,500/- to the child.

3. The respondent resisted the application for maintenance contending inter alia as follows:-

The first petitioner had married one Koyamon on 16-7-2001 and she is living with him. This respondent is a religious man having his own wife and children at Pattikkad. He is working as a teacher in the D.N.L.P School and for the last five years he is undergoing treatment for

heart decease in various hospitals. Doctors have advised him to do bypass surgery. This respondent has to spent Rs. 4,000/- per month for his treatment alone. All the averments in the petition for maintenance are false . This respondent does not treat anybody by doing black magic. The first petitioner had not approached this respondent for treatment as alleged. The alleged visit of this respondent by the first petitioner and the alleged prurient conduct of his towards the first petitioner are all false. This respondent has not had any sort of relationship with the first petitioner. At the time of this respondent living for Hujj along with his wife, they wanted someone to stay in the house and accordingly the first petitioner was brought to the house by her mother for staying in the house till the return of this respondent. It was at that time that this respondent saw the first petitioner for the first time and that was on 9-12-2002. This respondent and his wife went to Saudi Arabia on 14-1-2003. Until this respondent and his wife came back on 26-2-2003 after Hujj, the first petitioner was staying in the house along with the sister and children of this respondent. Since a house maid was not necessary after this respondent came back the first petitioner was sent back. The first petitioner wanted a loan of Rs. 25,000/- to renovate her house. But this respondent paid a sum of Rs. 3,000/- only which was the remuneration for the work done by her. The first petitioner thus left the house of this respondent on 1-3-2003. After this, there was no contact between this respondent and the first petitioner. This respondent has come to know that the husband of the first petitioner is visiting her frequently and he is staying with her also. It is known that the first petitioner is leading a loose life and is having extra marital relationship. This respondent has come to know that Koyamon, the husband of the first petitioner was shown as the father of the 2nd petitioner in all official records of the hospital as well as the Grama

panchayath. Since this respondent is not the father of the 2nd petitioner, this respondent is not liable to pay maintenance to the 2nd petitioner. This respondent is willing to undergo the D.N.A. test. His only income is the salary obtained by him as an L.P. School Teacher in the L.P. School. The petition for maintenance is devoid of any merit and may be dismissed.

4. On the side of the first petitioner she was examined as P.W.1 and on the side of the first respondent the revision petitioner was examined as R.W.1. Exts. D1 to D4 series were marked.

5. Originally as per order dated 18-3-2005 the Family Court , Manjeri allowed the petition in part granting maintenance to the 2nd petitioner at the rate of Rs. 1,250/- per month. Aggrieved by the said order Kunhithangal, the first respondent preferred R.P.F.C. No. 78 of 2005 before this Court. As per order dated 28-2-2006 this Court set aside the order passed by the Family Court and remanded the case to the trial court for fresh disposal. Thereafter two more witnesses were examined on the side of the revision petitioners and eight more documents were got marked on the side of the first respondent Kunhithangal. Thereafter as per order dated 1-7-2006 the Family Court, dismissed the M.C. holding that the claimants have not been able to rebut the presumption under Sec. 112 of the Evidence Act and that consequently the 2nd claimant shall be presumed to be the child born to the first claimant Seenath in her legally wedded husband Koyamon. It is the said order which is assailed in this revision.

6. I heard the respective counsel appearing for the petitioners as well as the first respondent.

7. Assailing the impugned order the learned counsel for the revision petitioners made the following submissions before me:-

The evidence of the first petitioner examined as P.W.1 shows that the respondent was treacherously gaining access to her under the cover

of black magic or sorcery. The first petitioner who was in distress, consequent on her husband Koyamon deserting her, had approached the respondent for some solution to know the whereabouts of her husband through black magic which the respondent professed to practice. But, instead of bringing solace to her, he was exploiting the situation. He secured her solitary presence and made her drink some water whereupon she became semi conscious and during that state the respondent had sexual intercourse with her. The poor woman could not resist. By the time she realised the fraud played on her, the respondent started threatening her with dire consequences in case she revealed the incident to anyone. She was, therefore, compelled to keep it a secret. But she could not hide the secret for long. When her pregnancy sufficiently advanced, her own relatives discovered the same. When they approached the respondent he initiated agreed to accept the first petitioner as his wife and the child in her womb as his own. He falsely made them believe that after the child birth he would accept them. But it soon turned out that he had no intention to acknowledge his mistake. Far from admitting his guilt, he disowned his paternity over the child and denied having any sort of relationship with the first petitioner. The 2nd petitioner is the unfortunate child born in that illicit relationship. The respondent who had initially offered to undergo the D.N.A. test, subsequently resiled from the same and unsuccessfully challenged before this Court the order passed by the Family Court directing him to undergo the D.N.A. test. Similarly, when the Ist petitioner prosecuted the respondent for the offence of rape, he had taken up the defence that the sexual intercourse was with her consent. The court below was wrong in invoking the presumption under Sec. 112 of the Evidence Act on the basis that the first petitioner has failed to prove non-access by her husband Koyamon.

8. I am afraid that I cannot agree with the above submissions.

Admittedly, the first petitioner Seenath who is the mother of the 2nd petitioner (Fazil) is a married muslim lady whose husband is one Koyamon. The said marriage is even now subsisting. According to her, a few months of her marriage, her husband Koyamon deserted her and thereafter under the guise of revealing the whereabouts of Koyamon through black Magic or sorcery the respondent had illicit sexual intercourse with the first petitioner resulting in the birth of the 2nd petitioner. Apart from her own interested testimony there was only the evidence of her own mother as P.W.2 and a neighbour as P.W.3. The fact that the 2nd petitioner was born to the first petitioner during the subsistence of a valid marriage is admitted. In such a case Sec. 112 of the Evidence Act is squarely attracted and it is for her to prove that at the time when she could have conceived the 2nd petitioner, her husband Koyamon had absolutely no access to her. It is in this context that Ext.D2 birth certificate assumes significance. If the respondent Kunhithangal was the father of the child in the relationship spoken to by P.W.1, in the normal course he would have been shown as the father of the child in the birth certificate of the 2nd petitioner. But the person shown as the father of the child is none other than Koyamon who is none other than the husband of the Ist petitioner. In such a situation, the burden on the first petitioner under Sec. 112 of the Evidence Act is further enhanced rendering a rebuttal of the presumption thereunder more difficult. P.W.2, the mother of the first petitioner would claim that she never knew the address of her son-in-law, Koyamon. But in Ext.P2 certificate it was P.W.2 who had furnished to the Registering authority the full address of her son-in-law.

9. The testimony of the first petitioner examined as P.W.1 also does not inspire much confidence. After the alleged desertion by her husband she claims to have gone to the respondent in the company of her mother to find out the whereabouts of her husband Koyamon. If

her version is to be believed the respondent asked her to come alone without the company of her mother . She would have it that thereafter when she went to the respondent alone he chanted certain prayers and pressed various parts of her body and then he asked her to come on another day. Any woman, whether habituated to sex or not would have realised the intention of the respondent from such a conduct. Still she went alone to him on the 3rd day to be ravished by the respondent after administering her some potion. This version of P.W.1 is too good to be believed.

10. It is true that the respondent Kunhithangal who had initially expressed his willingness to undergo the D.N.A. test had subsequently developed cold feet and when the learned Magistrate directed the test to be conducted the respondent resiled from his offer and this court in Crl.M.C. 505 of 2004 refused to interfere with the order passed by the Magistrate for the reason that the power under Sec. 482 Cr.P.C. cannot be invoked to quash such an order. But that does not mean that an adverse inference can be drawn against him for showing unwillingness to undergo the D.N.A. test.

11. D.N.A. test is not to be directed as a matter of routine. It is to be directed only in deserving cases. The conclusiveness of the presumption under Sec. 112 of the Evidence Act cannot be allowed to be rebutted by D.N.A. test. Proof of non-access between the parties to the marriage during relevant period is the only way to rebut that presumption. The presumption under Sec. 112 that a child born during lawful wedlock is legitimate and that there was access between the marital partners is indeed rebuttable. But the burden to rebut that presumption lies on the person questioning the legitimacy of the child. **(See Banarsi Dass v. Teeku Dutta and Anr. - 2005 (4) SCC 449).**

12. It is also true that when the respondent was prosecuted by the first petitioner for the offence of rape, he had alternatively taken

up the defence of sexual intercourse by consent. In such a prosecution he was entitled to take all defences available to him in law and merely because he took up the defence of sexual intercourse by consent, it does not mean that he was admitting the alleged relationship between him and the first petitioner . Admittedly, the criminal court had acquitted him and the said acquittal has become final. If at all the aforesaid defence taken up by him could be relied on, that also points to the fact that the first petitioner could be a woman of easy virtues.

13. Apart from the fact that the conclusion reached by the Family Court after the remanded trial, does not appear to be wrong so as to warrant interference by this court sitting in revision, it is well settled that the Family court cannot declare the paternity of a child born to persons otherwise than in conjugal wedlock. **(See Renubala Moharana v. Mina Mohanty – 2004 (4) SCC 215 and Bharatkumar v. Selma Mini – 2007 (1) KLT 945).**

14. In view of the foregoing discussion, I do not find any good ground to interfere with the order passed by the Family Court.

This Revision which is devoid of any merit is accordingly dismissed.

V. RAMKUMAR, JUDGE

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